IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962.

No. 1046

METRO M. HOLOVACHKA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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Preliminary.

In the interests of justice, the government's brief requires a reply.

ARGUMENT.

1. The government (p. 5), in the first sentence thereof, states petitioner complained that, in view of unfavorable newspaper publicity, he could not obtain an impartial jury from the Gary and Hammond areas.

This is an inaccurate interpretation of the record. The petitioner never suggested that an impartial jury could not be drawn from the Gary-Hammond area.

To conclusively clear any confusion as to the true facts, the petitioner respectfully represents to this court that the following simple statement of fact is uncontestable: (1) The petitioner did not request, but objected to, the court's dismissal of the petit jury drawn January 2, 1962, and made up of residents from Lake and Porter Counties; (2) the petitioner did not request, but objected to, a change of venue; (3) the petitioner demanded, as a right, to be tried by jurors from Lake and Porter Counties; and (4) the petitioner consistently objected to being tried by jurors from outside Lake and Porter Counties. (See App. 36-38, Motion of Defendant Objecting to Dismissal of Petit Jury Drawn January 2, 1962, and to Quash and Dismiss Entire Panel, Venire and Petit Jury Drawn January 17, 1962.)

Petitioner, in the petition for writ of certiorari, has insisted that the importing of jurors from without Lake and Porter Counties amounted to a compulsory change of venue in violation of the *6th Amendment* and the rights of a defendant under *Rules 18, 19 and 21(a)* of the *Federal Rules of Criminal Procedure* (Pet. 9).

The government, in its brief in opposition, chose not to favor this court with a reply to these contentions. Alterna-

tively, it has elected to ignore the fact that Lake and Porter Counties are, by rule of court, in and of themselves, a separate division of the Northern District of Indiana. Vaulting from this faulty premise, it proceeds to argue that the exclusion of any particular area in the district is within the sound discretion of the trial judge. Even as to this secondary position, the petitioner vehemently disagrees and respectfully represents to this court that the position of the government cannot be supported.

The government cites, as authority, four cases decided by this Court. (Gov. 5 and 6). An examination of these cases will indicate that their holdings are not consistent with the contentions of the government. In *Lewis* v. *U. S.*, 279 U.S. 63, jurors from ten counties were excluded because those counties were no longer within the district. In *Stroud* v. *United States*, 251 U.S. 15, the County of Leavenworth was excluded on claim of local prejudice; however, the government has failed to mention that this exclusion was at the request of the defendant. The defendant in that case complained to the court that he could not receive a fair trial from residents of that county. The petitioner, in the instant case never so complained; on the contrary, he always insisted that he could not receive a fair trial if Lake and Porter County residents were excluded. Any representation of the government which indicates that the position of the petitioner was otherwise than here expressed is inaccurate and misleading.

The jurors in *Rathenberg* v. *U. S.*, 245 U.S. 480; and *Agnew* v. *U. S.*, 165 U.S. 36, were selected from throughout the respective divisions and those cases are unrelated to the issues here presented.

The government also lists (p. 6) a number of courts of appeals decisions with short summaries of fact and

suggest that those cases are "closely analogous" to the facts of the instant case. A reproduction of these citations with a clarification of their facts (italicized) serves to illuminate the issue here presented and draws into question any analogies between those cases and the case at bar. *Spencer* v. *U. S.*, 8th Cir., 169 Fed. 562 (order—*entered pursuant to a rule of court applicable to all cases in all divisions of the District which provided that no citizen should be drawn from a county in which court would be held*—excluded jurors from Polk County, Iowa, including the City of Des Moines); *Jarl* v. *U. S.*, 8th Cir., 19 F. 2d 891, and *Myers* v. *U. S.*, 8th Cir., 15 F. 2d 977 (Order—*entered pursuant to a long-standing practice of court, applicable to all cases, which excludes residents in the county where the offense was committed*—excluded Douglas County, including the city of Omaha, Nebraska); *Walker* v. *U. S.*, 8th Cir., 93 F. 2d 383 and *Ryan* v. *U. S.*, 8th Cir., 99 F. 2d 864 (*relying on the authority of Jarl and Myers above*, upheld orders excluding Jackson County, including Kansas City); *Connelly* v. *U. S.*, 8th Cir., 249 F. 2d 576 (cert. denied, 356 U.S. 921) (Order excluded jurors from city and county of St. Louis—*entered after defendant had requested a change of venue*); *Walker* v. *United States*, 9th Cir., 116 F. 2d 458 (*relying on Jarl* v. *U. S. supra—and where there was no claim of abuse of discretion*—order excluded jurors from Bay City, Michigan, *and where the court noted that the jurors represented all counties in the division excepting one*). Also, *U. S.* v. *Skidmore*, 7th Cir., 123 F. 2d 604, cert. denied, 315 U.S. 800 (*where there was not one scintilla of evidence to support the charge that the grand jury or petit jury was illegally drawn*). There is no rule of court on this point in the Northern District of Indiana, but the practice prior to the instant case was to the contrary of the decisions cited by the government.

The petitioner respectfully submits that these cases are no authority for the position of the government. Of the eight court of appeal cases permitting the exclusion of jurors, six are from a single circuit, the 8th. In the lead cases, as noted above, the exclusion order was a result of a long-standing practice or rule of court in the respective districts thereby applicable to all cases and all defendants. *They are not authority to support a sua sponte exclusion order of a trial judge.* And, as noted above, those cases which were not pursuant to a rule or settled practice of court *rely* on precedent set in cases where such a rule was present and a reading of these cases evidences no attempt by the appellants in said cases to draw the distinction. Furthermore, *in no case* has a defendant's entire division been excluded without his consent, or in the absence of a local rule of court.

In support of the trial judge's unusual conduct in sequestering the jury on his own motion, and without preadvising counsel, the government cites (p. 7) the Supreme Court case of *Holt* v. *U. S.*, 218 U.S. 245, and three court of appeal cases, *Tinkoff* v. *U. S.*, 7th Cir., 86 F. 2d 868; *Janko* v. *U. S.*, 8th Cir., 281 F. 2d 156, reversed on other grounds, 366 U.S. 716, and *Klaven* v. *U. S.*, 8th Cir., 240 F. 2d 270. These cases taken together hold that the existence of prejudice *cannot be assumed* and that even over the insistence and objections of the defendant, a trial judge may properly permit the jury to separate, and that frequent admonishments by the trial judge were sufficient to preserve the impartiality of jurors despite prejudicial articles in local newspapers. *By contrast*, the government cites these cases as authority for the proposition that the trial judge, in the exercise of his discretion, *may assume* the existence of prejudice and, over the objection of the defendant, order the jury sequestered.

The government's brief on the jury question is inaccurate as to the record and authority; it is evasive in that it avoids the issues of compulsory change of venue, allowing grand jurors from Lake and Porter Counties, the fact the petit jurors were not truly representative of petitioner's community and the dangerous precedent now established by the opinion below.

2. The government would have this court believe that when the prosecutor accused the petitioner of receiving *graft*, he was acting properly or, if he had acted improperly, the accusation was hardly more than an innocent and innocuous incident which was immediately corrected when the trial court instructed the jury to disregard it.

The government now asserts that, in any event, petitioner was in no way prejudiced by the accusation. Yet the sole purpose of the accusation was to inflame and prejudice the minds of the jurors. The government admits it had no evidence to support the accusation of graft, and further admits that it had no source to show where the net worth increases came from. Under the circumstances, the inescapable conclusion is that the reference of the prosecutor to "graft" was a *knowing, willful and deliberate attempt* to smear the petitioner and to prejudice the jury.

As the late Justice Jackson said in *Krulewitch* v. *U. S.*, 336 U.S. 440, at 453: "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction." Again, as was stated in *Dunn* v. *U. S.*, 5th Cir., 307 F. 2d 883: "* * * if you throw a skunk into the jury box, you can't instruct the jury not to smell it."

Petitioner was indicted and tried for income tax evasion, not for his appearance before the McClellan Committee. The government has consistently projected the jury and the courts with references to said committee hearings.

This fact is illustrated by the government's reference on p. 8 of its brief (footnote) to matters outside the record of the instant case to support its position.

The government's concession (pp. 8-9), that the graft question was asked petitioner to establish "source" must obviously be viewed as the only motivating factor for the testimony of the witness Sinclair. In this fashion the government forged the link between "Rackets"—"McClellan Committee" and "Graft." The conclusion is inescapable. The purpose was to inflict upon the petitioner the type of prejudice from which the petitioner could not recover. This effectively prevented petitioner from obtaining a fair and impartial trial as guaranteed by the Constitution.

In connection with the government's explanation (p. 9, par. (c)) of offering evidence of the alleged violations of Indiana law[1], the government claims its purpose was to establish intent. The fact is the record not only is barren of any evidence to directly or indirectly establish a tax-evasion motive as to these items, but witness (Special Agent) Boyll admitted he did not know of any unreported income by the H & M Companies (App. 777). Thus *Spies* v. *U. S.*, 317 U.S., 492, 499 cannot support the government. The cases of *U. S.* v. *Taylor*, 4th Cir., 305 F. 2d 183, 185, and *U. S.* v. *Alker*, 3rd Cir., 260 F. 2d 135, involved kindred acts to those charged in their respective indictments and as such are distinguishable from cases in which the prejudicial acts complained about have no remarkable conform-

[1] Petitioner, in his Motion for Acquittal (App. 54-59), objected to all alleged violations of certain laws of the State of Indiana. *Rule 52(b) Federal Rules of Criminal Procedure*, states plain errors or defects affecting substantial rights may be noticed although not brought to the attention of the court.

ity to those charged in the indictment (as in the instant case).

Recognizing the length of this brief, the petitioner has not noted various mis-statements as to certain items of evidence referred to on pages 8 (par. (b)) and 9 (par. (c)).

3. On page 10 (No. 3) the government assures this Court the evidence was sufficient to support the conviction. Thus by mis-stating the issues raised by petitioner in his brief (pp. 16-23), the government avoids illustrating to this Court how its method of proof and evidence failed to meet the recognized standards for prosecutions in this type of income tax case.

The government's failure to specifically discuss the issues raised by the petitioner can neither be justified by the aforesaid amazing disregard of the cited facts and law nor by the unanimous opinion of the court below.

The errors complained of are brought into sharp focus, on just one of the many points, by the government's admission to this court that its prejudicial "graft" question (Gov. 9) was based on the prosecution's desperate effort to meet the standards for "current taxable income" and "likely source."

It is respectfully represented to this Court that a complete review of the entire record as will follow by the granting of this petition will justifiably illustrate the truth of petitioner's position and the amazing disregard of said record by the court below.

4. The government failed to cite any authoritative source to support the trial court's failure to permit the petitioner to present his theory of the Barrett Bond issue on his summary. The government also failed to illustrate why petitioner's authorities (Pet. 25-27) are not applicable.

The government conceded (Gov. 11, lines 2-5) that petitioner's other assets are increased in an equivalent amount by virtue of the Barrett Bond repayment. It is undisputed that the amounts received as principal repayment are tax-free in the year received. Therefore, the government concedes that the "taxpayer's other assets are increased by virtue of * * *" tax-free funds. By increasing the other assets, there is an increase or so-called "bulge" in the end result. As the increase or so-called "bulge" was caused by amounts which included tax-free funds, the amount of said tax-free funds must be subtracted in order to ascertain the current taxable net income. See *David H. Schaltz*, 30 TC 256 at 275 and Pet. 24-25.

In an effort to illustrate the technique or formula used in an attempt to reconstruct current taxable income, included herein as Exhibit "A" (p. 1a) is a simple *hypothetical* sample. This also illustrates petitioner's method for substracting the disputed tax-free principal received by petitioner in each taxable year. Line 17 of said Exhibit "A" is a vital figure. As applied to Exhibit "A" under the government's theory, "current taxable income" includes (per government's admission p. 11) $250.00 increased by virtue of his receipt of a tax-free repayment. Therefore, petitioner is convicted because of tax-free funds. The petitioner's theory eliminates the $250.00; therefore, the "bulge", if any, (Line 19) is not caused by tax-free funds.

It is submitted that denying the petitioner the right to present this theory as advocated by petitioner's expert witness Stroh (who had many years of Internal Revenue experience (App. 1189-91) along with the governmental and other experience of petitioner's counsel) (see Petition for Rehearing, p. 16, n. 6(1)) was a denial of petitioner's constitutional right to a fair and impartial trial.

CONCLUSION.

The government's brief clearly illustrates how petitioner's constitutional rights were violated. It is obvious that the government really cannot seriously and authoritatively defend the opinion below. It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

HYPOTHETICAL SUMMARY
SO CALLED NET WORTH-EXPENDITURE TECHNIQUE
RE: TAX-FREE RETURN OF PRINCIPAL

Line	Item	(A) 12 31 54	(B) Per Petitioner 12 31 55	(C) Per Government 12 31 55
1	Total Assets	1000.00(a)	2500.00(b)	2500.00(b)
	(Less)			
2	Total Liabilities	100.00	150.00	150.00
	(Equal)			
3	Net Worth (Line 3(B) or 3(C) minus 3(A) equal)	900.00	2350.00	2350.00
			less-900.00	less-900.00
4	Increase in Net Worth		1450.00	1450.00
	Adjustments To Compute Tax Liability			
5	*Add*: Non-Deductible Expenditures		200.00	200.00
6	*Deduct*:			
7	Non-Taxable Interest		10.00	10.00
8	*Non-Taxable Return of Principal*		250.00(c)	XX
9	Capital Gains Adjustments		5.00	5.00
10	Loans		10.00	10.00
11	Gifts		20.00	20.00
12	Tax Refunds		5.00	5.00
	(Equal)			
13	Corrected Adjusted Gross Income		1350.00	1600.00
14	Deduct:			
15	Itemized Tax-Return Deductions		40.00	40.00
16	Exemptions		600.00	600.00

Starting Point. Lines 4-16 not filled in for starting point.

Line	Item	(A) 12 31 54	(B) Per Petitioner 12 31 55	(C) Per Government 12 31 55
1	Total Assets	1000.00(a)	2500.00(b)	2500.00(b)
	(Less)			
2	Total Liabilities	100.00	150.00	150.00
	(Equal)			
3	Net Worth	900.00	2350.00	2350.00
	(Line 3(B) or 3(C) minus 3(A) equal)		less 900.00	less 900.00
4	Increase in Net Worth		1450.00	1450.00
	Adjustments To Compute Tax Liability			
5	*Add:* Non-Deductible Expenditures		200.00	200.00
6	*Deduct:*			
7	Non-Taxable Interest		10.00	10.00
8	*Non-Taxable Return of Principal*		250.00(c)	xx
9	Capital Gains Adjustments		5.00	5.00
10	Loans		10.00	10.00
11	Gifts		20.00	20.00
12	Tax Refunds		5.00	5.00
	(Equal)			
13	Corrected Adjusted Gross Income		1350.00	1600.00
14	Deduct:			
15	Itemized Tax-Return Deductions		40.00	40.00
16	Exemptions		600.00	600.00
	(Equal)			
17	*Current Taxable Income*		710.00	960.00
	(Less)			
18	Taxable Income Reported		710.00	710.00
19	Unreported Taxable Income (Bulge)		-0-	250.00

Lines 4 to 19 not filled in for starting point.

Starting Point

(a) This includes "Barrett Bonds" in the amount of $450, "Other Assets" of $550.

(b) This includes Barrett Bonds in the amount of $200 and "Other Assets" of $2300.

N. B. Barrett Bonds are reduced by $250 which is repaid to taxpayer and is reinvested in "Other Assets". Thus there is no reduction in Total Assets.

(c) $250 Barrett Bond non-taxable funds received in 1955 and invested in "Other Assets" included in total of line 1.